UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| JAMIE LEE ANDREWS, AS SURVIVING SPOUSE OF MICAH LEE ANDREWS, DECEASED, AND JAMIE LEE ANDREWS, AS ADMINISTRATOR OF THE ESTATE OF MICAH LEE ANDREWS, DECEASED, | ) | DOCKET NO. 1:14-CV-3432-SCJ |
| PLAINTIFF, | ) | |
| -VS- | ) | |
| AUTOLIV JAPAN, LTD., | ) | |
| DEFENDANT. | ) | |

TRANSCRIPT OF MOTIONS PROCEEDINGS
BEFORE THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE
WEDNESDAY, APRIL 6, 2022

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

TEDRA L. CANNELLA, ESQ.
JAMES E. BUTLER, JR., ESQ.
RORY A. WEEKS, ESQ.

ON BEHALF OF THE DEFENDANT:

DOUGLAS G. SCRIBNER, ESQ.
WILLIAM J. REPKO, III, ESQ.
JENNY A. HERGENROTHER, ESQ.
JUSTICE KEITH BLACKWELL

VIOLA S. ZBOROWSKI, CRR, CRC, CMR, FAPR
OFFICIAL COURT REPORTER TO THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA
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(HELD IN OPEN COURT AT 10 A.M.)

THE COURT: Good morning, y'all. Before we get started this morning, last week the judges for the Northern District of Georgia met and we decided that you no longer are required to wear masks while walking in the hallways of this building. We've also decided each judge will decide on his or her own room how they will handle matters as far as their courtroom. My position is if you want to wear a mask, please put a mask on. If you don't want to wear a mask, you don't have to wear a mask.

With that stated, Ms. Wright, will you call the case for today.

THE DEPUTY CLERK: Yes, sir. The Court calls the matter of Jamie Lee Andrews v. Autoliv, Case No. 1:14-cv-03432-SCJ.

THE COURT: Representing the plaintiff this morning?

MR. BUTLER: James E. Butler, Jr., Tedra Cannella, and Rory Weeks.

THE COURT: Okay, thank you. Representing the defense?

MR. SCRIBNER: Yeah, Douglas Scribner, Jenny Hergenrother and Justice Keith Blackwell.

THE COURT: We have three motions to deal with today. One shouldn't take too long. The first motion is the plaintiffs' motion for damages under O.C.G.A. 9-11-68(e). This is a Document 535 on the docket.

The defendants asked for a summary response to the -- frivolous claims for defense for the plaintiff. On March

31st of this year, the plaintiffs filed what they claim frivolous claim defenses. You all asked for a schedule, Mr. Scribner. I first decided about having your schedule starting on March 31st to respond to these defenses and claims, but to be fair, I'm going to start -- I'll give you 14 days from today to respond to it, and then you all, Mr. Butler, you have 14 days to reply.

MR. BUTLER: I don't quite follow. What are they responding to, Your Honor?

THE COURT: In defendant's Docket 535 filed on January 8, 2022, defendants asked for -- they filed a summary response, and they requested a briefing schedule once plaintiff fully identified all privileged claims and defenses that plaintiffs will be presenting. Y'all filed that on March 31 of this year. On March 31 plaintiffs filed a bench brief and set forth all the privileged claims and defenses.

MR. BUTLER: Your Honor, 14 days from today for them to respond to the bench brief?

THE COURT: And then y'all will have 14 days then to respond.

MR. SCRIBNER: May I be heard on this, Your Honor?

THE COURT: Yes.

MR. SCRIBNER: You anticipated my first motion, which was to continue this until we receive adequate information to assess the claims specifically --

THE COURT: Yes.

MR. SCRIBNER: -- they claim are frivolous. I don't know if you saw this, but yesterday we received three affidavits in the afternoon.

THE COURT: Yes, sir.

MR. SCRIBNER: This morning I received what I believe -- I'll let Ms. Cannella speak to this, a binder of information upon which they have an expert who is going to testify about the reasonableness of the fees. I'm receiving this for the first time. I've just scanned it. I haven't seen any of these documents.

THE COURT: You're ahead of me. I haven't seen it at all.

MR. SCRIBNER: But my point to all this is -- and this is what we wanted from the very beginning -- the law in Georgia says that you can't just say "I claim fees," unless this court says everything we did for seven years was frivolous, and I refuse to believe that you are going to do that.

If they identify something specific, then they have to allocate attorney's fees to that frivolous action. We haven't seen any of that.

So the way this is supposed to work is not only, respectfully, Your Honor, should I have time to respond to that brief, but if they had an expert who is going to opine and say, "I allocate $2,433 to that affirmative defense that you filed," we should have the opportunity to get our own expert to vet that. So

we just aren't there yet.

THE COURT: Let me say this, Mr. Scribner. I don't know anything about what you just said this morning, this expert. I didn't take a quick look at my docket this morning before I came in. So I will also give you time to get your own expert and be prepared to respond to their experts. Obviously, we're going from a 14-day schedule to a longer schedule. So while you're standing there, what type of time period do you need?

MR. SCRIBNER: Well, you know, I don't want to delay this. I know that when we filed our original motion, we knew you were going to have a hearing, and we wanted this in advance of the hearing so we could conduct our work and finish this case. But I think I have the right to get all documents upon which their experts rely. The affidavits you saw yesterday include -- I think Mr. Weeks said he had time entries. We don't have those. E-mails were reviewed. I need to know what literature they're relying upon. It's an expert disclosure. I would ask for expert disclosures for anyone who is giving an expert opinion in this case.

I don't know who this gentleman is who prepared this binder, but I would like a disclosure for him, and I would like a disclosure certainly from Ms. Cannella because she has said in her affidavit she is opining as to the reasonableness of the fees. I just want to follow the Federal Rules. If they get us a disclosure, we have time to counter with our own expert, to the

extent we need one. But what I'm looking for, Judge, is an opinion that I can vet and examine, tie it to particular claims, and then we can have a hearing on this. How much time will that take? It sort of depends, right, on what I'm going to get.

THE COURT: Well, I may have to do this. I may just give a schedule to the plaintiffs on getting this information to you on the expert disclosures and disclosure from Ms. Cannella, and then sort of work backwards.

MR. SCRIBNER: Yes.

THE COURT: So hold tight for a second, and you'll be back up until I speak to Ms. Cannella and Mr. Butler.

MR. SCRIBNER: Thank you.

THE COURT: Mr. Butler.

MR. BUTLER: Yes, sir. One moment.

Yes, Your Honor. Thank you.

We do have an expert witness here, his name is Mr. Alan Hamilton, and we would respectfully request the opportunity to put up his testimony with respect to the reasonableness of attorney fees. It will be factual testimony.

THE COURT: How is Mr. Scribner going to cross-examine him? He said he didn't know anything about it until this morning?

MR. BUTLER: Well, the problem with Mr. Scribner's motion for continuance and the entirety of his argument is this: Rule 68(e), which is what I'm going under here, is very clear. This is an issue to be decided at the conclusion of the trial.

If we had a jury trial, we could have done this at the conclusion of trial, but we didn't have a verdict. So we had to wait until we had a verdict. But if it was a jury trial, the jury would come out and give a verdict, and the judge would send them back in, and then we would have a conference and then they would come back out for this testimony, which is an expert witness.

THE COURT: I agree with all that. My question is, Mr. Butler, why didn't you tell Mr. Scribner who this expert was going to be as soon as you determined it? In other words, there is no way I can go forward with expert testimony this morning if he just got it. If you found out about this whenever, tell Mr. Scribner. Then I could say, Mr. Scribner, you knew you should have been prepared. But y'all are not denying you just told him this morning. So I can't make him cross-examine somebody when he didn't even know who they are. He just found out who they were.

When did y'all know about this expert?

MR. BUTLER: Pardon?

THE COURT: When did y'all know about you were going to have this expert? When did you hire this expert to testify in this matter?

MR. BUTLER: We didn't hire him. He is testifying for us.

THE COURT: When did you decide you were going to use him?

MR. BUTLER: What's today? Wednesday last week. Last

week.

THE COURT: Could you not have told Mr. Scribner Wednesday of last week?

MR. BUTLER: Perhaps, we should have. We would have the same objection we've got now.

THE COURT: Yes.

MR. BUTLER: We thought this was a proceeding that -- and I -- it's not what you would call complex. Mr. Scribner has practiced law -- I forget what his declaration filed years ago said, 25 years or so.

THE COURT: I don't deny Mr. Scribner is an excellent attorney, but even great attorneys have to be prepared.

MR. BUTLER: Well, my point is that Mr. Hamilton simply is going to testify that the contingency fee agreement was reasonable. That's the thrust of his testimony.

THE COURT: Mr. Butler, I understand your argument, but I'm just going to tell you, I'm not going to go forward with this expert this morning. Mr. Scribner has a right to be prepared for this expert. I don't doubt Mr. Scribner is an excellent attorney. I've seen that firsthand, but I'm not going to make him go forward.

MR. BUTLER: Yes, sir. Let me respond for the record to the balance of some things that Mr. Scribner just said.

First with respect to documents in the binder. They're all from the record or from Ms. Cannella's affidavit.

Second, the -- with respect to Mr. Scribner's position that we have to identify time spent and expenses spent on the particular conduct that we contend was frivolous. We don't agree with that at all. That's a legal question. The Court can decide that. Mr. Scribner can brief it in his 14 days, and we'll respond.

This is not a Rule 68(b) offer of settlement, attorney's fees proceeding. It's a Rule 68(e) proceeding for general damages, which under the statute may include attorney fees and expenses. But this is a proceeding to recover general damages for what Ms. -- Autoliv has put Ms. Andrews through, plus attorneys fees and expenses. That's a crucial distinction.

The definitions that are applied to a Rule 68(e) statute are those in the Georgia abusive litigation statute 51-7-80, et seq., which has been on the books since 1988. I'm very familiar with that. We also don't deny with the help of the then Mark Groover (phonetic) who wrote that statute a long time ago. The -- and that's all for my response.

Your Honor, if the Court is inclined to continue the hearing, you want us to give expert disclosures for Mr. Hamilton; is that correct?

THE COURT: Correct. And Mr. Scribner also requests a disclosure of Ms. Cannella.

Let me say this, Mr. Butler. I understand what you're saying. But here's what we're going to come down. So I want to

prepare you, just based on hearing what Mr. Scribner said. He's probably going to challenge some of y'all's time on these time records on which you spent. He didn't say that, but I've learned to read between the lines. He might accept what y'all -- but he wants to see time records; correct?

MR. SCRIBNER: Yes. Yes, of course. They have not produced any time records. They are a contingency law firm. And so what we have is an affidavit from Ms. Cannella saying, I think, e-mails in the case were produced; there were 4,000 of them. I'm going to give a .5 for each lawyer of the firm that received an e-mail. So, yeah, I believe that is under speculation and we're going to challenge that.

But the more fundamental issue -- two things: Mr. Butler said we had received this stuff. Not true. I just received these this morning. I have never seen these two documents. A depositions index, expenses incurred, I have not seen these documents. It's not true. What he just said is not true.

Number two, we still don't know what the claim is in terms of what was frivolous. Instead, what we have is an affidavit and a brief that says everything is frivolous.

MR. BUTLER: Your Honor, that's not true.

THE COURT: Hold on. One at a time.

MR. SCRIBNER: Let me finish, please.

Everything was frivolous, which is why their fees --

they don't limit them to any specific claim. They just say I want all my fees, which are $11 million, according to them, and they have a contingency fee arrangement. So it should be more than $11 million, presumably. And I'm hearing this from an affidavit the day before the hearing.

Here is what I would respectfully request. Ms. Cannella respectfully in her affidavit says, I am giving an opinion. That makes her an expert. I want an expert disclosure from Ms. Cannella and Mr. Hamilton, just like you would -- I may counter designate an expert of my own; I may not.

But what I really want more than anything else, though, Judge -- and we've said this from the very beginning -- if you're going to take a position that a particular defense or a claim was frivolous, identify it and tie it to legal fees. Otherwise, we are going to have a zany hearing where somebody just comes in and says, I've got $11 million in damages, and, Judge, you figure out which of these claims it's attributable to. That's not fair. That's not fair to the defense.

THE COURT: I'm going to tell you, Mr. Scribner, that's not going to happen.

MR. BUTLER: May I respond, Judge?

THE COURT: Yes, please.

MR. BUTLER: All right, first with respect to use of words like zany. Mr. Scribner is wrong as a matter of law.

To recover Rule 68(e), that -- general damages which may

include attorney fees, plaintiff is not required to provide time records for all of the time that plaintiffs' counsel spent on the case. That's a matter of law. Mr. Scribner is dead wrong.

Plaintiff is not required to slice and dice the time and effort they spent on the case and allocate a certain portion of it to particular defenses that plaintiff claims were frivolous. We're not required to do that. That would be an impossibility. We're not required to do the impossible.

With respect to what claims the defense says are frivolous, those were stated in the brief and they are stated again in Ms. Cannella's affidavit. Now, there are others that we could claim are frivolous, but for purposes of Rule 68(e) we've got enough.

For example, for seven years this defendant denied that the airbag what was defective, which changed everything about the case. And not until the morning of October 4 in 2021, the first day of trial, did this defendant come in and admit the airbag was defective. Had Autoliv, the world's largest supplier of airbags and seat belts, admitted that from the beginning, as they should have, Mazda would have had no defense, the settlement with Mazda would have been for a lot more money, and Autoliv would have had to defend. Because as the Court recalls, you put it in their judgment, Autoliv knew airbags failed. Autoliv knew the consequences of an airbag failing in this car with this seat belt was going to be a catastrophic injury or death because the

seatbelt was useless if the airbag didn't work.

So with respect to Mr. Scribner's statement that we claim everything is frivolous, again, I refer to the bench brief and Ms. Cannella's affidavit. That's simply not correct.

Now, if the Court directs a hearing be continued and that we give expert disclosure, we will certainly do that. Ms. Cannella's affidavit is her expert disclosure. It's got -- I forget how many paragraphs. It's really long.

THE COURT: Let me ask you this, Mr. Butler. It is your position that you already specified what your frivolous claims are, and Mr. Hamilton is an expert and Ms. Cannella is an expert.

Here is what I plan on doing at the end of this hearing. I'm going to draft an order, and the order is going to tell y'all to make findings. I'm going to tell you what schedule I want on it. But if y'all take the position that you have specific ones in there, then I will make you file one, and I will go through and look to see what they are. If they're there, fine; and if they're not there, fine. And then this order is also going to give y'all a schedule, when you're going to do disclosures. It's almost going to be like a discovery order, even though I don't like to use the word "discovery," because we're not reopening rediscovery. It's going to outline a time limit when things have to be filed and responded to, and we're going to have a set hearing date. So I will probably have this case a little while longer.

So anything else y'all need to tell me? Because you're

going to get an order probably next week outlining everything I just talked about. So now is the time to tell me. Because after that, that's how I'm going to proceed.

MR. BUTLER: Yes, Your Honor.

And just for the record, because the hearing is going to be continued, I do want to put in the record and proffer up and -- may I hand the Court an exhibits?

THE COURT: Yes, sir.

MR. BUTLER: And I also hand it to the defendants. This is plaintiffs' Exhibit 1184, which is a document filed by Autoliv, Inc., on January 28, 2002, with the U.S. Securities and Exchange Commission. It's a Form 8K, and under the law, as I understand it and as indicated in this document, Autoliv, Inc., has to file this with the SEC. This is an excerpt. The whole thing is, I forget how long, 48 pages, I think. We have no objection to Autoliv submitting the whole thing.

But if you look over here at page 5 -- let's see. No, page 6, this is -- and the reason I bring this up, one of the frivolous defenses we're going to argue about is one mentioned in Autoliv's motion to amend the Court's judgment. And that is the claim that the Court was wrong in considering the financial situation, circumstances of Autoliv, Inc., rather than just as well as Autoliv Japan, Ltd. That's in their motion to amend that the Court's got. They also argued that at trial. Here is Autoliv, Inc., filing a required SEC document, Form 8K, and on

page 6 at the bottom it says that Autoliv -- that the State of Georgia returned a verdict against Autoliv in a wrongful death products liability lawsuit stemming from a fatal car accident in 2013.

If you read on, it says, entered an order requiring Autoliv to pay about approximately $113.5 million.

The last paragraph on that page says the company, supported by its legal counsel, believes the Court's verdict was in error. The company is defined in this document to be, quote, Autoliv, Inc., close quote.

THE COURT: Mr. Butler, I don't want to argue it right now.

MR. BUTLER: All right.

THE COURT: You're going to have a hearing to argue it.

MR. BUTLER: This document also reveals -- and this will be another -- add it to our list.

THE COURT: Mr. Butler, I'm giving y'all a hearing to argue what the frivolous claims are.

MR. BUTLER: Yes, sir. I will pause, but I said the frivolous things are included in the bench brief and Ms. Cannella's affidavit. I want to correct that by saying that Autoliv, Inc.'s argument they've made, we also believe to be frivolous. And there is also proof in this document they concealed documents.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Any last words on this particular motion?

MR. SCRIBNER: One thing, Your Honor, and I will stick to these issues. I think that's what we were originally talking about. There is not a lot of case law on 9-11-68(e). The case law that we reviewed said very clearly that to the extent -- and if a frivolous claim or defense is made, you get fees caused by that defense.

If you look at 9-15-14, as a former state court judge, I'm sure you're more familiar with that --

THE COURT: Correct.

MR. SCRIBNER: -- very similar standard, and what it says as follows. This is the Moore v. Hullander, H-U-L-L-A-N-D-E-R, case, 345 Ga. App. 568.

THE COURT: Give me that cite again.

MR. SCRIBNER: Sure. 345 Ga. App. 568, it is a 2018 case.

I only reference this for the Court, Your Honor, because of Mr. Butler's statement that he doesn't need to allocate and apportion fees. This is what Moore says:

"Moreover, when awarding attorney fees under O.C.G.A. 9-15-14(b), the trial court must limit the fees award to those fees incurred because of the sanctionable conduct. Thus, lump sum or unapportioned attorney fees awards are not permitted in Georgia, and we will vacate the remand for further fact finding

where the trial court's order on its face fails to show the complex decision-making process necessarily involved in reaching a particular dollar figure and fails to articulate why the Court awarded one amount of fees rather than another," under O.C.G.A. 9-15-14(b).

Here the trial court awarded a lump sum of $4,000 in attorney fees without showing the complex decision-making process necessarily involved in reaching that particular dollar figure, and failed to articulate how the award was apportioned to include only fees and expenses generated based on the sanctionable conduct.

I say this -- and there are many, many cases like that, Venta v. Mayton, 362 Ga. App. 264. The point is this. And you see this, Your Honor, less in personal injury cases and more often in commercial cases. You may have three contract claims, and two of which have a bona fide controversy; the third of which did not. And the defendant moves for summary judgment and says just asserting that claim was frivolous, and I had to spend time on my summary judgment briefing, et cetera. You can't say, like they want to say here, they just said I have $11 million in fees. I want it all. You can't do it.

What's going to happen, we all know this is going up to the Eleventh Circuit, we're going to come right because you have to apportion two of the claims that you claim are frivolous.

One last point, and that is, Mr. Butler said the

disclosure -- in the affidavit is the disclosure. Well, the affidavits reference documents. If you're an expert, we all know this, and you are relying on documents to opine, I get to see the documents. Thank you.

THE COURT: Thank you.

The next motion we're talking about is the plaintiffs' motion to amend and modify the Court's final order of judgment. This is Document 536. Plaintiffs' request amendment to judgment in two ways: Basically, they are talking about the Carmichael case. It is plaintiffs' argument that the Court was incorrect in apportioning the amount, the whole amount -- the entire amount, excuse me, should have been given over to Autoliv and not 50 percent to Mazda.

Plaintiffs' request the Court further modify the judgment to include the amount of prejudgment interest that Autoliv owes for failing to timely accept a settlement demand under O.C.G.A. 51-12-14. They're requesting $4,734,349.55.

Let me go back again to the apportionment aspect. Plaintiffs' request the Court amend the judgment to include the amount of compensatory damages omitted because of apportionment or fault of Mazda of $13,509,671.70 was based on the case law issued on November 1, 2021. And it's the Carmichael case decided by the Georgia Court of Appeals.

We are checking to see what the Georgia Court has or has not done regarding this case, and I think as of yesterday they

hadn't said anything. But we have a former expert that is on that court that will kind of tell us what kind of time limit they're looking at to give us an answer on that.

But both of y'all also indicated, you might as well forget about the Carmichael matter and look at it based on the amount of contributions Mazda and Bosch made to the plaintiffs.

The plaintiffs indicated that they are willing to have the Court have a confidential agreement entered into between Bosch and Mazda. And the plaintiffs' brief, as I understand it, y'all will consider the Court having an in camera inspection to look at the amounts privately. Defense argued, I'm not quoting you exactly, that y'all think the Carmichael case has been decided incorrectly, and y'all will get something along with contributions as well.

I will hear argument first from the plaintiffs, and then response from the defense, and then the plaintiffs get last word on this motion.

MR. BUTLER: Your Honor, since the Court's not going to take up the plaintiffs' Rule 68(e) motion today, may Mr. Hamilton be excused?

THE COURT: Yes, sir.

MR. BUTLER: Thank you so much. I think he's already been excused.

THE COURT: I think he read the tea leaves.

MS. CANNELLA: Thank you, Your Honor.

Plaintiffs' motion to amend addresses two issues as you stated, whether the interest should be added to the -- to the judgment and in what amount. And, two, whether apportionment applies to this case or setoff.

On the first issue, Autoliv does not dispute the rate of interest, the date of rejection or the number of days that elapsed. The verdict against Autoliv is over the demanded amount of 9.5 million, so the interest is clearly owed.

And the only dispute left is whether the interest is simple interest or whether it compounds annually. Yes, Your Honor.

On that issue, as our brief addresses, we have both the statutory construction, the actual statute says that it is an annual rate, and we also have the testimony of Mike Daniels, who was the expert in this case, and who does economics all the time. And he looked at the statute and said that that annual statement means that it compounds annually.

So it seems like a pretty easy one, a pretty clear one. If that's the case, then the total as of the time of judgment was $4,734,349.55. The letter was sent seven years ago today, actually, is the -- is the -- is the anniversary of that.

The brief also points to O.C.G.A. 7-4-2, which states that the legal rate of interest shall be seven percent per annum simple interest, end quote.

Can I pass a copy of that up to the Court?

THE COURT: Yes.

MS. CANNELLA: Thank you.

And so that's an example of the Georgia assembly saying this is how we explain you should do simple interest when you should do simple interest. And that's actually really an interesting statute because it has that per annum statement, and then it clarifies simple interest. Here we just have an annual rate.

On the apportionment issue, the question is whether the Court should apply binding precedent of Carmichael v. CVS, like Judge Grimberg did in a recent case we cited in our brief and which I have a copy here.

THE COURT: I have it.

MS. CANNELLA: Okay. Thank you, Your Honor.

Autoliv argues that the Court should not follow that binding precedent. And as the Court is aware, the Georgia Supreme Court decided a case called Alston & Bird v. Hatcher on August 10, 2021. And that case said if there's one defendant when the case was originally filed, then according to the plain language of the apportionment statute, there is no apportionment.

On November 1, a couple weeks after trial ended, the Georgia Court of Appeals decided CVS v. Carmichael, which says if you get to trial and there is only one defendant left, then Alston & Bird says there is no apportionment. And as everybody here knows, there is a petition for cert pending. We don't know

if it is going to get granted.

THE COURT: The word "brought" typically -- has a very special meaning in this argument. When this case was originally brought, there was three defendants, and then through settlement, by the time we got to trial, verdict, there was just one defendant. In looking at Carmichael, does Carmichael address that?

MS. CANNELLA: No. Not explicitly, Your Honor, but Carmichael does say we have to read the statute according to the plain language and have a strict construction of that. So -- oh, I'm sorry. Did you ask me about Alston & Bird or Carmichael?

THE COURT: Carmichael.

MS. CANNELLA: I am so sorry. Yes, Carmichael did address the situation that we have here. There were multiple defendants in the beginning when the case was filed, and then by the time you got to trial, there was only one.

Now, in the case that Judge Grimberg had, the defendant actually contacted the Court to say Carmichael controls and we can't have apportionment. We didn't have that in this case. But Austin -- Autoliv says that it is plaintiffs' fault that we didn't tell the Court about this early. We've waived it, or whatever their argument is, and I think that's really interesting. Because if -- if everyone knew about this decision, according to what Autoliv is saying, everyone should have known about this, did Autoliv know about it? And if they did, why didn't they do what

the defendant did in the case in front of Judge Grimberg and contact the Court and let them know, because that means that their apportionment defense was no longer valid.

So I bring that up just to address that timeliness argument that the defendant made.

On the issue of statutory construction, Your Honor, two things: One, the context of the statute is at trial. So we cited in our brief a case that talks about how when you interpret a statute, you have to look at the context in which the statute is taking place. And so in the statute we have here 51-12-33(b), the language is that we are talking about the, quote, trier of fact. So the trier of fact is identifying the actor -- is the actor who must undertake the tasks of determining the total amount of damages to award and apportioning those damages. The trier of fact can only take those actions at trial. So the statute is occurring in the context of trial.

The verb phrase in 33(b) is brought, we interpret that phrase in the context of "at trial."

So if you're in front of a jury and you want to refer to the case as it was when you filed, you would say, ladies and gentlemen of the jury, this case was brought against Mazda, Bosch and Autoliv. You would use that past tense.

If you were referring to the case about how it was brought in the beginning, you might say, ladies and gentlemen of the jury, this case is a case brought against or was a case

brought against Mazda, Autoliv and Bosch. But the statute doesn't use the phrase "was brought". It doesn't use the phrase "brought". It uses the phrase "is brought".

If you use that phrase in front of the jury, what would you say? Ladies and gentlemen, this case is brought against Autoliv. It wouldn't make any sense to say, this case is brought against Mazda, Autoliv and Bosch because it's not when we go to trial, it's not a case that is brought against all those parties.

In order to read the statute as Autoliv argues the Court should, the statute -- you have to remove the word "is" from the statute. And if it's helpful, Your Honor, I have a copy of the statute with me.

THE COURT: We've got it.

MS. CANNELLA: You've got it. Okay.

So that's why a strict construction requires that we look at the parties who are present at the start of trial. That is what the Court of Appeals concluded in binding precedent, and it's what -- it's what the Georgia Supreme Court will have to conclude in order to read the statute strictly. The entire bar seems to agree with the Court of Appeals, because during this legislative session, in less than eight months, we have a law that has been passed by both the House and the Senate that undoes both Carmichael and the Alston & Bird v. Hatcher decision.

THE COURT: Here's my concern. Let's say hypothetically we get all these things done, which I doubt very seriously, in

time for this case to go to the Eleventh Circuit, if this issue has not been resolved by the Georgia Supreme Court by that time, what they are going to do is just certify the question to Georgia Supreme Court. So why not wait to see what the Georgia Supreme Court does or does not do? Now, I doubt very seriously this case is going to be settled. I think the Georgia Supreme Court probably will write two or three opinions about this matter before this case gets to the Eleventh Circuit, but is this not a matter where I should just say, let's see what the Georgia Supreme Court does?

MS. CANNELLA: Your Honor, that is a great question. That is what I was going to start off my argument with, but we got off on a different direction.

But the point is, there is a really easy way to handle this. And is for Court to apply the binding precedent of the Georgia Court of Appeals, and three things would have to happen for the binding precedent to change: The Georgia Supreme Court would have to accept cert, it would have to accept cert on this question, and it would have to overturn the Court of Appeals.

Those three things are unlikely to happen. One, primarily because the Supreme Court accepts cert on big issues that are going to affect a lot of people.

THE COURT: This is not a big issue?

MS. CANNELLA: No, Your Honor, because the law has changed. As soon as the governor signs the bill, we have a new

law. So we're talking about a very short window of cases that would even be affected by this. We have a Court of Appeals decision on it, and it's not a big issue anymore.

So there's a good chance the Court won't accept cert, and if that's the case then we have binding precedent to apply. So --

THE COURT: And that's what I'm saying, if they don't accept cert, then they're giving me an answer that way.

MS. CANNELLA: I'm sorry, Your Honor?

THE COURT: If they have not accepted cert, then they have given me an order.

MS. CANNELLA: Yes, Your Honor, because there is a Court of Appeals decision. If they want to overturn it, then they need to accept cert.

So this Court is perfectly safe following the Georgia Court of Appeals binding precedent. Autoliv doesn't even argue that it's not binding precedent. Follow that law, if it changes during the appeal, which Autoliv has already announced its intention to appeal -- so anyway, to follow that law, to then allow the Eleventh Circuit if something happens between now and then and the Georgia Court of Appeals accept cert and overturns the bidding precedent that is out there today, then the Eleventh Circuit can conform the judgment to that. And, obviously, if the law changes, we're not going to object to that.

So -- the law is the law. But the law right now is that

all of the verdict belongs and Autoliv is responsible for the whole thing.

THE COURT: I still don't see what's wrong with just saying, wait until the Georgia Supreme Court either accepts cert or denies it. If they deny cert, Carmichael is the law.

MS. CANNELLA: Your Honor, the reason not to wait is because we're nine years since Mr. Andrews' death. We are seven-and-a-half years since this case was filed. And so waiting for the Court to accept cert, to have briefing scheduled and then start our appeal in this case, we're just -- we're just building in an extra year of time into --

THE COURT: Based on what I heard this morning in the first motion that's got to be argued -- listen, I understand you're all going to move along, and don't take this personally, any of y'all, but I want to move this case along, too, off my docket. However, when I send something to the Eleventh Circuit, I would like to feel at least feel kind of confident of what I'm sending them, and this case is not going to be resolved in the next 90 days.

I'm going to send y'all a detailed order. I'm just running through my mind what the order is going to say when Mr. Butler and Mr. Scribner was talking. This case is not going to resolve in the next 90 days. I see a whole lot more litigation going on in this case, and I'm not an expert on Georgia Supreme Court, and I never claimed to, but I don't think they're going to

tell me something on the next 90 or 120 days on this Carmichael case.

MS. CANNELLA: I'm not an expert either, but I would tell you that if they accept cert, we're in for another, at least, year.

THE COURT: Well, if they accept cert, they're telling me something there as well.

MS. CANNELLA: Yeah, but -- I mean, we don't know what it is.

THE COURT: Well, that's even more reason for me to wait. If they accept cert -- again, if they accept cert, there's on reason for me not to wait. Again, if I send this case to the Eleventh Circuit, they're going to say, let's see what the Georgia Supreme Court says. So either way, nothing is going to be decided on this until the Georgia Supreme Court makes a decision.

MS. CANNELLA: Yes, Your Honor, and I agree with that completely. And, of course, the Court can run its docket however it wants. My only request would be for the Court to at least consider if we get -- obviously, if we get a no on cert, than the bidding precedent is --

THE COURT: They've giving me an answer.

MS. CANNELLA: Then we have an answer.

So certainly if the Court wants to wait until cert is decided, that's fine. But the --

THE COURT: I think -- excuse me for cutting you off.

It's not prudent or wise on my part to make a decision on that issue until I get something from the Georgia Supreme Court. That's the way it is going to be. The very issue that we're talking about now, the Couch case, the Red Roof case, that case started in my court. I certified that question to the Georgia Supreme Court. And the reason why, because I knew nothing was going to happen until they told me something one way or another. It's the same with this issue. If they don't accept cert, they've given me an answer. If they accept cert -- I know you want to move this along, I want to move this along, but why would I make a decision until they make a decision?

MS. CANNELLA: I understand, Your Honor. We were pressed that the Court -- if they do accept cert, that the Court would consider the fact that when we go -- when this case is finally done here in the trial court, there will be an appeal. There's a time delay associated with even getting on the docket. Then there will be a briefing schedule. Then there may be an oral argument schedule after that. That, in our experience, is a two-year situation.

THE COURT: I don't argue with you there. It's a time-consuming matter. But how would you like to go 18 months and then this case gets sent back here by the Eleventh Circuit and we have to start -- start another -- not start over, but maybe start certain aspects of this cases over again.

Let me make this simple for everybody. Let me just make

this simple. I'm not going to rule on this issue until I hear from the Georgia Supreme Court. If they don't accept cert, they've given me an answer. If they accept cert, I'm going to wait until they tell me what the answer is. I don't want to be disrespectful to you or Mr. Scribner, but I'm going to sit here and hear argument, but I'm not going to rule on this until the Georgia Supreme Court tells me something. Not to be offensive or disrespectful, but that's just the way it's going to be.

MS. CANNELLA: I understand, Your Honor.

THE COURT: All right.

MS. CANNELLA: Thank you.

THE COURT: All right. Mr. Scribner, I would love to hear your argument. There is no sense of me hearing your argument on this, because I've already made my mind up.

MR. SCRIBNER: Mr. Repko, who is the only person good at math on our side, is going to talk about the interest.

THE COURT: We're talking interest. Yes, we're talking interest.

MR. SCRIBNER: And we'll go from there.

MR. REPKO: Good morning, Your Honor.

THE COURT: Good morning, Mr. Repko.

MR. REPKO: Two issues to talk about on the prejudgment interest front.

THE COURT: All right.

MR. REPKO: We can boil it down to two questions: Is

plaintiff entitled to prejudgment interest? That's the threshold question. And then question two, if so, should that interest be calculated as simple interest or compound interest.

Ms. Cannella suggested that question one is signed, sealed and delivered. We say not so fast. As the Court knows, we filed, on behalf of Autoliv, a motion to amend the judgment to apportion fault as to Bosch. As we spelled it out there, we would like and request that fault be apportioned to Bosch, fault be reduced from Autoliv, and as a result the amount of compensatory damages for which Autoliv is liable will be decreased. And we believe it will be decreased below the threshold for which plaintiff can recover prejudgment interest.

So I know we're going to get into that today. I simply request that the Court reserve ruling on this motion for prejudgment interest until the Court has heard our arguments as to apportionment as to Bosch.

Turning now to question two. Is plaintiff entitled to simple or compound interest? It really boils down to what does the phrase "at an annual rate" mean. Plaintiffs says that means compound interest. We say it means simple interest.

As support, plaintiff relies on the declaration of their expert Dr. Daniels. Dr. Daniels says, and I'm quoting here, based on his experience -- or let me start it again.

"Based on my experience and training as an economist, the reference to interest being calculated at an annual rate means

that interest is compounded yearly."

Your Honor, this is in the docket, but that is the substance of what Dr. Daniels has to say. It's that one paragraph, paragraph six.

Notably, let's take a look at what's not in that opinion from Dr. Daniels. There's no mention of whether this phrase "at an annual rate" is used commonly to refer to compound interest. He doesn't mention whether he's actually seen it before and used it. He just says, based on his experience and training, I believe that at an annual rate means that interest is compounded yearly. There's no mention of, yes, I've seen that a dozen places. I've seen that in two dozen statutes. There is no mention of that whatsoever.

Furthermore, there is no reliance on any legislative history, nor does Dr. Daniels hold himself out to be a past or former member of Georgia General Assembly. So he can't -- and he's offered no evidence as to what the intent of the Legislature was here.

So that moves nicely into what plaintiff would have the Court look to for the intent of the -- the intent of the General Assembly.

Ms. Cannella cited to O.C.G.A. 70-4-2. Because in that statute, the General Assembly expressly used the word "simple interest". And so plaintiff would tease it out as this: The General Assembly knows and has used in the past the explicit

phrase "simple interest". So if the Legislature intended for this statute to be simple interest, then they would have said so. Well, Your Honor, we can make the exact same argument tying it to the use of "compound interest". So why don't I go ahead and mention on the record the statutes that I'm referencing, and then I'll hand them up.

There are quite a few, Judge, that make express reference to "compound annually". So we argue, well, if the Legislature uses the phrase "compound annually" in statutes, then if it intended in the statute that is at issue here to award compound interest, they would have done so. And so those statutes -- and I've got ten of them here so I'm going to read them off quickly -- O.C.G.A. 20-3-514, O.C.G.A. 33-5-33, O.C.G.A. 33-28-2, O.C.G.A. 47-2-204, O.C.G.A. 47-2-266. And, Judge, I can go on for about five more, but I won't. I think the point is clear here.

Plaintiffs' argument regarding the use of simple interest in the statute O.C.G.A. 7-4-2 is at best a wash here. Because they say, oh, this statute makes use of the word "simple interest," while we pointed to other statutes, and a handful of them, in which the word "compound interest" is used expressly. So that argument doesn't carry the day.

So what does carry the day? Well, in our papers, Your Honor, we reference the Wolf Camera case that's at 253 Georgia Court of Appeals 254. It's a 2002 case. And the key language

there is, "As the prejudgment interest statute is in derogation of the common law, it must be strictly construed." In other words, the Court should interpret the statute in a way as to have as little effect as possible in altering the common law.

At common law there was no prejudgment interest for unliquidated damages as was the case here. So the question is, and the question to the Court is, do I apply the statute in a way that gives more prejudgment interest, which is plaintiffs' interpretation with the compound interest, or do I interpret it in a way that gives less interest? That would be the simple interest, and that's our position.

We submit that if the Court, as it must, strictly construes this statute, that is the conclusion that it will reach, that it is simple interest, not compound.

And, Your Honor, I won't get into detail any further, but we did reference a treatise and a law review article in our papers, and I will refer the Court to those. Those state that simple interest is the traditional and, in fact, the majority rule.

THE COURT: Thank you. You get the last word.

MS. CANNELLA: Thank you, Your Honor.

JUSTICE BLACKWELL: Your Honor, can I be heard briefly on the Carmichael issue? I know the Court's inclination is to wait to see what the Georgia Supreme Court does, but I would just like to, if the Court will permit, make a couple of points on

that.

THE COURT: Any objection to that.

MS. CANNELLA: No, Your Honor.

JUSTICE BLACKWELL: Good morning, Your Honor.

THE COURT: Good morning.

JUSTICE BLACKWELL: So in answer to the Court's question about how long we may be waiting to hear from the Georgia Supreme Court on the cert petition, I believe the cert petition was filed at the very end of December of last year. And the Court has been typically taking between four and six months to rule on cert petitions. So given that, I would anticipate that we probably would get a decision on the cert petition most likely in the next 30 to 90 days.

Now, there is one thing that I wanted to caution the Court with respect to, and that is, I heard the Court say a couple of times, well, if the Court denies cert, if the Georgia Supreme Court denies cert, we have our answer. Maybe.

The Carmichael case presents some unusual vehicle issues for that -- that particular issue. And I can tell the Court that the Georgia Supreme Court looks very carefully in deciding whether to grant cert on a particular issue and whether that particular case is the right vehicle for addressing that issue. There have been cases where there was an issue of gravity where the Supreme Court had real uncertainty about whether the Court of Appeals had, in fact, gotten it right, but the Supreme Court passed on that

particular case and decided to wait on another case to come along that presented the same issue because of vehicle concerns, because there were kind of threshold issues that might prevent them from ever getting to the issue of gravity.

And in the Carmichael case, and this is described in the briefing a little bit, the issue or the holding that the plaintiffs are relying on in this case from Carmichael is an alternative holding. And so for the Supreme Court to really be able to reverse the Court of Appeals on that, it would have to take up both holdings, both of the two alternative holdings. Because otherwise if they only take up one of two alternative holdings, anything they say on that point would be dictum.

So for that reason, I do think if the Court does grant cert, that this Court would -- it would be quite sensible, in my view, for this Court to wait to see what the Georgia Supreme Court says.

If the Supreme Court were to deny cert on this issue in Carmichael, however, I just wouldn't want the Court to be left with the impression that that amounts to the Georgia Supreme Court endorsing the holding of the Court of Appeals on this point. Because the ultimate decision for this Court is what -- under Erie, which is what would the Georgia Supreme Court decide.

THE COURT: Thank you.

JUSTICE BLACKWELL: Thank you.

MR. BUTLER: May I respond briefly, Your Honor?

THE COURT: Yes.

MR. BUTLER: If the Supreme Court denies cert, Carmichael is binding this Court. That's it. If the Supreme Court accepts cert, apparently Mr. Blackwell wants the Court to wait until a year or two for the Supreme Court to make a decision one way or the other before the Court decides the -- our motion to amend. Now, what does that mean as a practical matter for Ms. Andrews? Frankly, so the Court will have -- will be aware of this, if we're going to have to wait another year or two, it makes also more sense for the plaintiff to just ask the Court to deny the motion. It's going up to the Eleventh Circuit. By the time the Eleventh Circuit gets around to it, the Supreme Court would have ruled, and if the Supreme Court ruled contrary to the Court's ruling, then the Eleventh Circuit can straighten it out. This -- there's been too much delay and frivolous litigation in this case. Thank you, Your Honor.

THE COURT: The only thing I will say to both of you all is, I understand the timing -- I understand those things, but this matter is not going to be resolved as far as the Eleventh Circuit is concerned until certain things happen. And I may have to make a decision if they deny cert. I may have to say, okay, here is how I'm going to rule, but let's just deal with it there.

Thank you, Mr. Butler. Thank you, Mr. Blackwell.

MS. CANNELLA: Your Honor, just a couple of points on this interest issue.

That whole response, Your Honor, is -- it could be exhibit number three million and two to the evidence that Autoliv's end game in this case is delay. The defense complains about Mike Daniels' expert affidavit. He was not challenged by Daubert in this case. He was not -- there was no opposing expert that Autoliv hired to counter his calculations or his expertise. Autoliv stipulated to his numbers at trial. And Autoliv has had our brief and Mike Daniels' affidavit on this issue since February 7, 2021 -- 2022. It never used that time to find its own expert. It didn't do anything. This whole idea that we've asked for something so outrageous that they need more time, they always need more time to counter it is false.

The statute says "annual rate". An expert that everybody agrees is qualified has said in his experience that means "compounded annually". His testimony is unrebutted. The issue should be decided in plaintiffs' favor.

And, Your Honor, I agree that -- well, let me tell a little story. When I was a clerk for Judge Lawson, he hated getting reversed. So whenever --

THE COURT: Surprise, surprise.

MS. CANNELLA: -- I helped him with an order, his question was always: Am I going to get reversed? Nobody wants to get reversed. And I remember I helped him with an order that was very complex and new, and after I left, it went up. And when it came back down affirmed, he called me to tell me because he was so

excited. So I understand the Court's concern completely.

And plaintiffs had no objection to the Court waiting until cert is, you know, either accepted or denied. But what I hear from Autoliv reading between the lines, like you said, is that if cert is denied, they're not done. They're going to ask the Court to do something more to certify a question or to, you know, still ignore the Court of Appeals. It's delay, delay, delay, and there is one way for the Court to help us with that.

THE COURT: I think if cert is denied, then what I'm going to have to do is rule what I think the Georgia Supreme Court would say or would have said. I could be wrong, but let me tell you a little story.

Probably three years after I started this job, I had a case dealing with a matter of a particular issue, and the law clerk and I looked at it, the Court of Appeals had two cases on it. But one panel of the Court of Appeals said this, and another panel said something else. Unique. So I said, What do I do? Well, the parties said, God, I really need to get this issue decided, Judge.

Now, I knew in my mind that the Eleventh Circuit is going to say what they eventually said, but I -- I want to make everybody happy. I'm going to rule. I'm going to move it along. I ruled. It goes up to the Eleventh Circuit. Judge Edmondson is on the panel. I never go to the arguments, obviously. But somebody else happened to be there. He said, certify this

question, Georgia Supreme Court. The question I should have done myself. I knew. Well, make one mistake, that's human. But to make the same mistake twice, there's another word for that.

So believe me, I want to get this case over with; believe me, I do. But it's just -- I just don't see how -- I can't fashion until I at least know something -- if they deny cert, honestly, I hear Mr. Blackwell, Judge, you may have to make a decision or you don't. That's what you're saying. I'm prepared to do that, but there are some things in life you don't forget, and I knew and the law clerk knew and we've both knew we should have certified it, and we didn't. I ruled. It goes to the Eleventh Circuit, and Judge Edmondson and Judge Dubina, and I can't remember -- I think the third judge was a district judge. Judge Edmondson, certified, Georgia Supreme Court.

So the time it took for them -- for me to go from me to them or from my court, excuse me -- an English teacher would be horrified -- from the District Court here to the Eleventh Circuit, it was about nine months before they got to it, six to nine months. Okay? It gets to them, they say, certify it, Georgia Supreme Court. So six to nine months that was wasted. If I had just dealt with it, I knew -- I had should have done in the beginning. It goes to the Georgia Supreme Court, Georgia Supreme Court gets it. Judge Blackwell was on the panel, so I won't say how long it took them to do it, but they didn't do it fast enough. Come back -- so, really, I didn't save anybody any time by not

certifying it myself. That's what I'm saying to you, that's what I'm saying to y'all. I didn't save anybody anything. I was trying to do something that I was told when I got to be a Superior Court Judge 28 years ago, you can't make everybody happy.

MS. CANNELLA: No, Your Honor, you cannot.

THE COURT: So that's been my motto, just rule, if they like it, fine; if they don't, there is an appeal court here.

MS. CANNELLA: Just in case it helps, you can blame it on us. It is fine with us if you deny our motion. We prefer a denial.

THE COURT: Those people in the Eleventh Circuit, they don't look at it that way. You signed it, you did it. I don't get to say it was this person's fault or it was that person's fault; it's me, and that's the way it should be. I understand what you're saying, but I told y'all what I'm going to do.

MS. CANNELLA: Thank you, Your Honor.

THE COURT: Let's move to the third motion.

The third motion, defendant's motion to amend the motion or motion for a new trial. According to the defendant, the $100 million in punitive damages award should be eliminated altogether, because the evidence in this case does not authorize any award of punitive damages as a matter of Georgia law. If not eliminated entirely, the award should, at a minimum, be reduced because it is unconstitutionally excessive and improperly based on the financial condition of non-party Autoliv, Inc.

Defendant further states, alternatively, the Court should order a new trial so that compensatory damages and punitive damages can be properly reconsidered.

Mr. Scribner, this is your motion, so you go first.

MR. SCRIBNER: Your Honor, I think the way to deal with this, I think the constitutional issue, the punitive damages, the consideration of the economic wherewithal, those are new to you at least in this case. And so -- and Justice Blackwell was going to argue that.

I'm going to argue Bosch first because you are familiar with it, and I'm going to turn the baton over and give him the time that he needs to do.

THE COURT: That's fine.

And then you all have time for a response.

MR. SCRIBNER: We have moved to amend the judgment to apportion fault to Bosch. It does not appear that there is any dispute from the plaintiff that the elements of a product liability claim are met as to Bosch. The same product liability claim under which the Court found Autoliv responsible.

Federal Rules of Civil Procedure 59 authorizes this Court to revisit its earlier decision to correct clear error that manifests injustice.

Now, I know that we spent a lot of time at trial, and you paid very close attention. And I know you have clerks who -- I don't know if you get discounts on the number of pads they use,

but they are furiously writing notes and following everything that's happening in this case. So I understand the burden upon me today to get this Court to do something that no one wants to do, which is to say, I made a mistake. I think I got that one wrong. That's a hard thing to do. It's a really hard thing to do for anyone at any time, and so I know. I know what I'm up against.

But we believe and maintain that that ruling was manifestly unjust, ultimately because the Court in this case awarded plaintiff $113 million vis-a-vis Autoliv -- and we're going to talk about that -- and apportioned nothing to Bosch. Zero.

Under the Georgia law, three elements must be satisfied in order to prove a claim for straight products liability, just three. One, the entity manufactured the product; two, the entity knew when they sold the product it was defective; and three, that it was the proximate cause of the injuries.

Here the plaintiff does not dispute that those three elements were met as to Bosch. The first element is met because evidence demonstrates that Bosch manufactured the airbag censor system. There's the airbag module that Autoliv supplied, but as you recall, there was nothing wrong with the module. It was that sensing system that failed. It's judgment, Your Honor, at pages 20 and 71 you note on multiple occasions that it's Bosch's airbag electronic front sensor system component that caused the nondeployment of the airbag. Plaintiffs' airbag expert, Mr. Chris

Caruso, said Bosch made available to Mazda the option to select two sensors instead of one. That is the trial transcript, Volume 3 a.m. at page 119.

Bosch also manufactured the electronic front sensor system for purposes of strict liability under O.C.G.A. 51-1-1 because they were actively involved in the design specifications or formulation of the system.

The Davenport decision, which is the decision upon which your predecessor granted summary judgment to Autoliv, said: You have to have -- if you're not an actual manufacturer of a product, you have to have a row in the design if it is a design claim. So our argument to your predecessor was, this is really a design claim as it relates to the seat belt -- I'm talking about Autoliv now -- and the ultimate designer is Mazda. They make the final decision, they sent the component parts.

So Davenport -- when it went up to the Court of Appeals, what the Court of Appeals said, I'm not going to get into that, but you did manufacture these parts, these component parts of the seat belt. So you, Autoliv, are a manufacturer.

My point is in addition to manufacturing a component part, like Bosch did here, the electronic front sensor system, they were clearly involved, actively involved in the design of the electronic front sensor.

Plaintiffs' airbag expert Mr. Chris Caruso testified, and I quote,-Bosch designed electronic system -- strike that.

If -- the quote -- the Bosch-designed electronic system had sent the signal to the Autoliv airbag, it would have deployed. That's trial transcript Volume 3 a.m. at page 107.

Later on the same day on page 119, Mr. Caruso says, quote, Bosch said to Mazda, the use of two electronic front sensors enhances the performance of the sensing system, especially for compliance.

So the point to all of that is whether you look at a pure manufacturer or someone actively involved in the design, which is what Davenport says, you can become a, quote, manufacturer under the statute, under the circumstances. Bosch is a manufacturer of that front electronic sensor design.

Element number two was also met because that system was defective. Plaintiffs' airbag expert, Mr. Chris Caruso, acknowledged his opinion that the airbag electronic front sensor system was defectively designed. That's trial transcript Volume 3 a.m. at page 96.

He also said had the system been designed with one of his alternative proposals, including the use of dual sensors, the system would not have been unsafe and unreasonably dangerous. That's trial transcript Volume 3 a.m. at 107.

In other words, what Chris Caruso said was there are lot of reasons why I find this electronic front sensor system defective. But one for sure, and his principal chief complaint, having sat with him not only in this courtroom but at a

deposition, is that the electronic front sensor system only had one sensor. As you may recall, Judge, he said, When I was at GM we had two sensors. And what that does, it ensures that if one gets knocked loose, like it did here, that other sensor performs. And so it's defective to only include one sensor. You need to have two.

Also, I would mention, Your Honor, that your judgment, at pages 20 and 71, you reference the fact that Bosch's electronic front sensor system ultimately caused the nondeployment of the airbag. And Chris Caruso testified that the failure to deploy the seat belt pretensioner and airbag in the subject collision rendered the vehicle defective.

So we have two things: Bosch is clearly a manufacturer under the statute under which Autoliv was held responsible. Bosch supplied a defective component part, undisputed. The only expert in the case that talked about it was Chris Caruso and he said you need two sensors, not one.

Finally -- finally, the third element is did it cause Mr. Andrews' death. Well, plaintiffs airbag expert Mr. Chris Caruso at Volume 3, trial transcript Volume 3 a.m. at 107, said, if the system would have been designed with any of his proposed alternatives, including the dual sensor design, this would have prevented the unsafe condition that ultimately led to Mr. Andrews' death.

He also mentioned that morning at page 110, on

cross-examination, if Mazda had paid $5, they would have had two sensors. Right? That extra sensor would have cost Mazda $5.

He also testified that morning at page 107, that if the Bosch-designed electronic system had sent the signal to the airbag, it would have deployed. And we all know, Your Honor, that Dr. Ziewjewski, plaintiffs' biomechanic expert, testified that if the airbag deployed, Mr. Andrews would be alive today.

They manufactured or participated in the design of a defective product that caused the injuries. Plaintiff doesn't dispute this. What they say in response is, well, the Court was correct in not assigning any fault to Bosch because the airbag didn't deploy because the EFS, that's electronic front sensor system, the connector got disconnected before it could send its signal to deploy, and he testified that Mazda was responsible for that failure, not Bosch. True. I don't know what to say. I'm not going to argue about it. It's absolutely true, but it highlights Chris Caruso's main criticism of this electronic front sensor system which you need two. Because, as you will recall, Mr. Andrews, unfortunately, hit that tree right in the middle and the tree knocked that sensor loose. If you have two sensors, he's alive today. And the reason that vehicle has two sensors is Bosch because -- strike that. The reason it only had one sensor is Bosch, although they recommended two sensors, delivered one.

Now, he testified clearly the dual electronic front sensor design would have provided redundant crash protection. So

that upfront sensor would not have come dislodged as it did here, that single sensor, and you had two sensors and he would be alive today, according to Dr. Ziejewski. Two is always better than one.

And this is where I think, Your Honor, if I'm overly passionate, forgive me, because I've lived this case for a long time. You have a situation where Autoliv supplies a seat belt that this Court says was defective. It is undisputed that Mazda knew about stops and chose not to use one. And it is undisputed that Mazda knew about the threshold, the deployment threshold and where it was, and they could have increased it. But the Court said, regardless, Autoliv is responsible.

The thrust of our argument as to why that seat belt was not defective, as you will recall, Your Honor, because there is an engineering trade-off. The more forward excursion you allow, the less chest injuries you have and allows somebody to ride up the airbag. The less forward excursion, more force you apply to that chest, you risk injuries. And so no doubt the plaintiffs' expert said this design was improper. They did. But they acknowledge that there is a tradeoff. You have to make a hard decision. How much forward excursion do you want? Mazda knew that; their experts conceded that. Nonetheless, the Court said, well, that seat belt is defective, and you, Autoliv, are responsible for it. Now, let's compare that with what Bosch did.

Bosch supplied a part to Mazda. Bosch supplied a defective part to Mazda. That defect caused his death. Period,

full stop. What makes our case better than Bosch's is that they don't have a tradeoff. The seat belt is designed in such a way that we can have a debate as to how much forward excursion you should allow.

Our expert came in and said, look, if he uses a six-inch stop, there's all sorts of bad things. You could kill somebody in an accident like that. And so we could debate should you have a stop, should you not. Should you have a higher deployment threshold or lower. It depends on the accident; it depends on the size. I have a young girl, a 14-year-old. I would tell you, she would want more forward excursion because she's small in stature. She doesn't have fully-formed chest bones yet. So we can all have a debate. It is the essence of reasonableness.

So against that backdrop, you issued an award against Autoliv for over $100 million and gave Bosch nothing. Bosch doesn't have that tradeoff. There's no trade-off. There is no case -- he said there is no case under which one sensor is better than two. Two is always better, always, and it was standard in the industry.

So I say all of that, Your Honor, attempting to convince you that you were wrong, and that's a hard thing to do. But you can see if you were Autoliv in this case, and you understand the facts as I've just outlined them, that it feels unfair to apportion $113 million to Autoliv and zero to Bosch.

And so that's the point of our motion. We ask that the

Court revisit the facts and look at the testimony I've cited and at least apportion Bosch as much fault as you did to Autoliv, from our perspective, and recognizing it is just our perspective. It's not really a close call in terms of the conduct of the two companies. One had an engineering design decision that had a tradeoff.

THE COURT: Hold on. Mr. Butler. I can't --

MR. BUTLER: Sorry, Your Honor.

MR. SCRIBNER: In other words, that trade-off is you give here and you take there. You may save the life of someone in a high-speed accident who is 200 pounds, but you could really injure someone in a lower-speed accident with, you know, small stature, a hundred pounds. That is the tough tradeoff that you make. And so we feel like that is a reasonableness issue. You can't say that about Bosch. There is no circumstance under which one sensor is better than two. And if two existed on this vehicle, he would be alive today and it would have cost Mazda $5.

THE COURT: So it's your argument that it was Bosch's decision to just put one sensor rather than two?

MR. SCRIBNER: No, it is Mazda's decision because they are the OEM. Just like it was Mazda's decision to use a seat belt with no stop and a 2.5-kilometer threshold. It is always Mazda's decision. So when you go back and think about this, there is no doubt that Mazda should be apportioned fault there. And you did -- one thing we don't know, Judge, because we can't define

what you and your clerks were thinking, we don't know if that apportionment related to the airbag or the seat belt. Because Mazda is responsible for both. It is in their vehicle. Mazda makes the final decision on the airbag; Mazda makes the final decision on the seat belt. No doubt. And so we can't tell because it's not set out in your order whether you said, well, I find fault with Mazda in the airbag section or do you find fault with Mazda in the seat belt section. Because they knew about the stop and they knew about the high threshold and they chose not to do that.

But for purposes of the Bosch/Autoliv dynamic, I respectfully submit that if you look at what these companies did, the main difference -- they both supplied a component part to the OEM. They both gave the OEM options. We gave Mazda options for low, immediate and high thresholds. They chose low. Mazda said you could use one or two. They chose one. So they both did the same thing in that respect. The difference is in the Autoliv situation, you have a trade-off, an engineering trade off. You can make an argument one way or the other. You can't make an argument on one v. two.

The final thing I'll leave you with, when I asked -- and I will respectfully ask that you take a look at this. When I asked Mr. Caruso, How do you give Bosch a free pass? And he said, Well, here's a document. And the document says, you know, there are benefits to a two -- two sensors instead of one. And I asked

him, Is there anything else in the file that you reviewed that causes you to believe that they discharged their duty as a reasonable supplier should? And he said, Nope, it's all in that one document. It's really not even one document. It is one sentence, and it says two is better than one. That discharged their duty, according to him.

And so you can see why if you are in our position representing Autoliv to the best of our ability, you look at that situation and feel like that is unfair.

You worked hard, as did your entire staff. You worked very hard at this case, and reviewed the documents, and I'm not suggesting otherwise. But we all make mistakes. And I would ask the Court to give thought to -- to remedy what we think is a mistake.

THE COURT: Thank you, Mr. Scribner. Justice Blackwell. I'm going to let them make their whole argument, and then you all come.

JUSTICE BLACKWELL: Judge, this -- our motion to amend, it's been well and pretty thoroughly briefed on the legal issues. I'm not going to, unless the Court has questions about particular things, go into all of the arguments we have made. There are two I would like to hit on briefly this morning.

The first is the Court's reliance on the financial condition of Autoliv, Inc., the parent company in this case, as opposed to the particular financial circumstances and condition of

the named defendant, Autoliv Japan.

The Court considered this, to some extent, on a motion in limine that was filed before trial. And the Court in denying Autoliv's motion in limine to keep out evidence of the parent company's finances, the Court drew significantly on a decision from the Fourth Circuit called Daugherty. And in the Daugherty case we think that Daugherty probably would support the admissibility as a matter of evidence of financial reports concerning the parent, to the extent that they shed light on the financial condition of a subsidiary of that parent. That's what was going on in Daugherty. The Court pointed out that the SEC filings of the parent, in fact, discuss the financial condition of the subsidiary, and, therefore, that evidence did, in fact, shed light on the financial condition of the subsidiary, which was the defendant in Daugherty.

Here the evidence that was admitted at trial may well shed light on the financial circumstances of Autoliv Japan. But as I read the Court's final order, the Court didn't look so much to those SEC filings to make inferences and try to discern what the financial circumstances of the subsidiary were. Instead, the Court went straight to what the financial circumstances of the entire corporate family, from the parent and all of the subsidiaries were. We think for that to be a material fact with respect to the amount of punitive damages would require a classic Val Pearson under Georgia law. And we just don't think -- the

Court identified a number of circumstances, a great deal of which was frankly litigation conduct. And conduct, Your Honor, that I think is fairly unremarkable, like an employee of one company testifying as a corporate representative on behalf of a different subsidiary within the corporate family, particularly, an overseas subsidiary.

We don't think that there was evidence in this case sufficient in the classic corporate veil piercing sense to pierce the corporate veil. And, therefore, irrespective of what evidence may have been admissible, the key fact is the financial circumstances of Autoliv Japan, not the financial circumstances of the parent company. There was direct evidence before the Court, there were stipulations as to the net profits of the subsidiary Autoliv Japan over a period of years that the Court could have drawn on in assessing punitive damages. That, I think, would be much more difficult for us to complain about had the Court looked to there, but we do think it was improper to base the amount of punitives on the fact of the financial condition of the parent company.

The other issue I want to turn to, Your Honor, is the -- whether the punitive damages award in this case is grossly excessive in violation of the guarantee of due process. We raise that under both the Georgia due process clause and the federal due process clause. I'm not aware of any case law suggesting that for due process that those standards differ between the state and

federal constitutions, and so we argue this under the BMW v. Gore framework.

Now, we do have a separate argument under Colonial Pipeline as to the excessive fines clause in the Georgia constitution, but I want to talk -- I want to talk to the Court about the due process analysis, because that's the analysis that I think should give the Court the greatest pause with the punitive damages award that was entered.

There's a substantial body of case law. The Court is familiar with that substantial state case law, BMW v. Gore, State Farm v. Campbell. I won't go through that in detail.

I think the critical issue here is on the second of the three guideposts. The Court has explained in some sense the first guidepost, reprehensibility, may be the most important in context, but it's difficult to quantify because there has to be some degree of reprehensibility to justify any punitive damages as a matter of constitutional law. The question is where on the spectrum do you fall in the range of reprehensibility. We would suggest that the evidence in this case to the extent that it shows reprehensibility -- and we don't dispute the couple -- that at least a couple of factors might show some degree of reprehensibility here, but this is far from, for instance, the tobacco cases that are at the high, the extreme end of reprehensibility. And so we would ask the Court to take a look at that.

But on the ratio because reprehensibility is not quantifiable, courts frequently move to the second guidepost, which is the ratio.

So how do we figure the ratio in a case like this? Well, it all depends on what counts on the compensatory side of the ledger. And that is, I think, a difficult issue for the Court to sort through. Now, there are some cases, but I will concede they have cited a case, a District Court decision going the other way. We don't have anything definitive from the Eleventh Circuit, but there is a split on authority. We think the greater weight of the authority is on our side, but there is a split on authority on whether in the ordinary course you look only at the claims on which punitive damages were awarded, or you look at all of the claims that kind of go to the -- arise out of the same injuries.

We think that just based on that case law alone, that the greater weight of the authority is you limited it to the claims for which punitive damages were authorized and were awarded. That would mean that in this case you would be talking about $1 million as apportioned to Autoliv, or even if you consider, depending on the outcome of the Carmichael issue, even if you -- even if you brought in the amount of pain and suffering, damages, general damages that were attributed to Mazda, that would only be $2 million.

So if $2 million is the compensatory baseline and you have $100 million punitive award, that is a 50-to-1 ratio. I'm

not aware, Your Honor, of any Circuit Court decisions decided since BMW v. Gore anywhere in the country, in the Eleventh Circuit or otherwise, that approve such a high ratio when you have such a substantial compensatory damages award. There are cases that go beyond single-digit multipliers when you have really de minimis-type compensatory damages.

There was a case in the Eleventh Circuit, the AT&T count case where AT&T was involved in some -- I believe it was fraudulent misconduct in that case, but the individual compensatory damages were in the four-figure range. And so the Court approved a pretty substantial -- the Eleventh Circuit approved a ratio that was in excess of nine to one. But, of course, the Supreme Court has cautioned us that ordinarily and generally speaking -- they have made clear they're not drawing bright lines -- but generally speaking in the heartland of punitive damages cases, four to one is probably approaching the constitutional limit, and anything beyond nine to one is going to be incredibly suspect and will rarely meet constitutional mustard. That is the guidance that the Supreme Court has given.

Now, even if -- even if the Court looks at that split in case law, or do you just look at the compensatory arising out of the claims on which punitives were awarded, or can you look at all of the claims that involve the same injury, that arise in some sense out of the same injury? Even if the Court looks at that and decides that you don't necessarily have to limit it to just claims

on which punitive damages were awarded, we would submit that there is a second and even more compelling reason in this case why you still can't include the wrongful death damages, the full value of life damages in on the compensatory side of that ledger. And that is because, first of all, Georgia law is very clear that you cannot have punitive damages added onto a wrongful death claim in addition to the full value of life, measure of damages. Why is that?

Well, the reason is because the full value of life measure of damages is already itself punitive. The Georgia Supreme Court has explained that. It's punitive in more than one respect. It's punitive in the sense that the damages are actually awarded to somebody irrespective of the loss they sustained, because you measure the full value of life from the perspective of the decedent. And so whoever is entitled under statute to make that recovery as their survivor -- you know, it doesn't matter what they lost.

Now, there is no doubt in most cases the people who are entitled to recover have lost a great deal. They have endured a great deal of suffering in those circumstances. But it's not inevitably true, Your Honor. You can imagine in strange relationships where somebody recovers for the loss of a relative when they are entitled under statute to recover, and it's really not a loss that is felt to them. We he don't suggest that's the case with Ms. Andrews, but that is the reality. The measure of

damages awards substantial damages to someone who did not themselves sustain the injury and is not required to show that they sustained any injury themselves.

The measure of damages is, also, punitive in the sense that it allows for the full value of life, which the Georgia Supreme Court has explained exceed the actual value of life. The economic component you don't back out necessarily, and the usual expenses of life. But the Georgia Supreme Court has made very clear that the full value of life measure of damages is itself punitive, and it is intended, the Court has said, to make homicide expensive in Georgia. It is intended to make civil defendants who -- whether it is by negligence or intent have caused the death of someone. It is intended to make that very, very expensive for them. It is intended to make them feel pain. Because it is itself punitive, to count it as compensatory really distorts both sides of the ratio. Because if you include the wrongful death damages and you include them on the compensatory side, you are overstating in the ratio what the compensatory damages are and you are understating what the punitive damages are.

So we think that when you look at this in light of the unique nature of Georgia law, that to calculate the ratio you really have to exclude the wrongful death damages. And when you do, I think it is very, very difficult under the decisions of the U.S. Supreme Court, under the decisions of the Eleventh Circuit, and under the persuasive decisions that we have from the other

circuit courts around the country, I think it is very, very difficult to sustain. In fact, I think it's impossible to sustain a 50-to-1 ratio in this case.

So with that, if the Court has any questions about our arguments, I would be happy to address those.

THE COURT: I don't have any questions. Thank you, sir.

JUSTICE BLACKWELL: Thank you.

THE COURT: Mr. Butler.

MR. BUTLER: Can we take a break before we proceed, Your Honor?

THE COURT: Yes, we can take a 15-minute break and we can start back at 11:50.

(Whereupon, a break was taken.)

THE COURT: Let me just say this. I think we will be done by 12:45, but if not, we will have to stop and take a lunch break. I have a meeting at 1:15. At 1:15 it will probably take about 30 minutes to go from here to get to the meeting. So I'm not trying to rush anybody. I decided last night I wasn't going to put time limits on y'all. If we're not done by 12:45, we will stop and take a lunch break.

Mr. Butler, you can proceed.

MR. BUTLER: Thank you, Your Honor. From my part, we'll be done well before 12:45.

THE COURT: Well, I have to get a reply.

MR. BUTLER: Well, the argument from Autoliv was fairly

brief.

I want to start by agreeing with Justice Blackwell that the issue has been well-briefed. Mr. Scribner started by talking about Bosch, which was the last thing in their motion which was completely dealt with at the trial. And I would respectfully submit that this motion is more proof about why punitive damages were and are mandatory. Remember, the motion says there should have been no punitive damages at all. So does the reply brief. This defendant is unrepentant, has no contrition, still insists it was blameless and pure seven-and-a-half years after this lawsuit was filed, nine after Mr. Andrews was killed. This defendant says of the Court's final order of judgment that it was, quote, counterintuitive, close quote, excessive, close quote, improper, close quote, and represents, quote, a manifest injustice.

I don't think there is any doubt about the necessity both in punitive damages and large punitive damages. And this defendant remains unrepentant with no contrition, despite the fact that the seat belt that killed Mr. Andrews is still out there.

The Court will recall, I think it's in your judgment, that Mr. Prentkowski, the corporate representative, basically said that Autoliv does no field performance analysis at all. Well, I have been doing auto part cases since 1986 or '7. The first one was against Nissan for the family of a young law student who was driving to watch me try a case when he got killed. And Jeffrey Willis (phonetic). And I remember another one -- a defendant that

didn't at least have some field performance analysis function. Now, sometimes they weren't very good, they weren't complete, but the defendants don't get the documents, they didn't have them produced. But they all except Autoliv, at least, have something that they can call field performance analysis.

The problem here is that there is still no warning of the danger these seat belts pose. This defendant can't give a warning about a seat belt so defective that it is useless, useless, if the airbag fails, which is foreseeable, and it happens, as defendants had to admit finally.

Instead of warning people, as it should, especially given this Court's judgment, Autoliv is paying lawyers to defend the indefensible and attack all who disagree.

There's a reason for that. Delaying payment makes money for Autoliv. I think we put this in our response brief. Whatever value you put on this case, Autoliv has held that money for seven-and-a-half years. Not warning people, not doing a recall saves money for Autoliv.

The fundamental problem we have with Autoliv's motion is this: Except for the ratio argument, which is new, all the rest, which is also humbug, I'll get to that in a moment, all of the rest of it is nothing but a rehash of what was considered before or during trial. Every bit of it. That means that the motion, except for the ratio argument, is nothing but pure venting. We put this in our -- in our response, and I don't know what page it

is on, but we cited the Eleventh Circuit law about rule 59(e). It's very clear. Quote, the only grounds for granting a Rule 59(e) motion is newly-discovered evidence -- not here -- or manifest errors of law or fact, close quote.

THE COURT: Mr. Scribner is arguing the Court made a manifest error of fact.

MR. BUTLER: He says that. I'm going to get to Bosch last, because that's where they put it last. It's a throwaway argument, but I'll get to that, Judge.

A lawyer incanting the words -- I think this is clear error, doesn't mean that it really is or that there is any grounds for the lawyer to incant those words. And in this case, there is no grounds for that.

A Rule 59(e) motion is no substitute for appeal and thus cannot be used to, quote, relitigate on matters or raise argument or present evidence that could have been raised prior to the entry of judgment, close quote.

Well, that touches the ratio argument, because if they wanted to do this hairsplitting thing about -- upon what is the -- I guess the comparator for ratio purposes is just pain and suffering, or is it also death damages? They could have done that at trial. I stood here to ask for not less than a hundred million dollars in punitive damages. They could have raised the ratio argument then; they didn't do it.

We cited these cases, the Jacobs case, the In Re Kellogg

case. If you look at their reply brief, it is nothing but reargument. The punitive damages award should be eliminated altogether. That's page number one. And then a bunch of others.

Quote, the subject seat belt was not an outlier in any material way, close quote. Well, the evidence it was an outlier was overwhelming and uncontradicted. They didn't have an expert witness to testify to the contrary. They couldn't get one. Nobody would testify to that for Autoliv.

Here's another argument. Autoliv Japan did not consciously disregard Mazda's concerns. The Court heard Mr. Prentkowski. Quote, Mazda wasn't concerned, so we weren't concerned.

The Court improperly considered evidence of nonparty Autoliv, Inc., financial conditions. Well, now, Mr. Blackwell -- Justice Blackwell just got up here and said something different than the argument heading. The argument heading is, quote, the Court improperly considered evidence of nonparty Autoliv, Inc., financial condition. Mr. Blackwell said -- let me find it here. Now, it's on here. I can't find it. I wrote it down. But it basically said, the Court based its punitive damages verdict upon the financial condition of Autoliv, Inc. That's not in the judgment. It's not true.

Now, I submitted to the Court earlier this astounding document, Plaintiffs' Exhibit 1184, which is a January 28, 2022, submission to the SEC by Autoliv, Inc., the parent corporation.

If you look at paragraph -- the second page, Item 202. On January 28, 2022, Autoliv, Inc., paren, quote, the company, close quote, close paren. All right, that's who the company is, Autoliv, Inc.

Go over to page 6 of 26, at the bottom, rendered a verdict against Autoliv. That's what it says, not Autoliv Japan, Ltd. Entered an order requiring Autoliv to pay. That's what it says. Because Autoliv manufactured the seat belt that was involved in the accident.

Do you see the words Japan, comma, Limited there anywhere? No. This Autoliv, Inc., functions as one integrated -- integral, integrated unit, as the Court observed in its judgment. As a matter of fact, their corporate representative at trial didn't even work at Autoliv Japan, Ltd., the nominal defendant in this case. There's more in this document that the Court needs to see.

If you look at the next page, page 7, at the top of the page, the company has determined that the loss with respect to this litigation is probable. Reading down, the third sentence, it is reasonably possible that the company may have to pay the entire amount of damages awarded by the Court. Do you see that sentence? Skip the next sentence. We've submitted this in evidence. I don't mean to skip it. The Court can consider it, but what I want to highlight is the next sentence. Quote, the company believes that its insurance should cover all of the types of damages awarded by the Court, close quote.

Well, awarded by the Court is $113.5 million. Now, that caught our attention. Why? Because we asked for all of the insurance coverage, and all we got was an answer identifying a $25 million policy. And Mr. Weeks put it in our response brief that he complained about that, because it appeared that, once again, that Autoliv had been guilty of concealing evidence, other policies, because the Autoliv, Inc., report to the SEC says we've got coverage for all $113.5 million.

And plaintiffs Exhibit 1185, I submit to the Court, is an excerpt from Autoliv's reply brief, which again I think demonstrates the nature of this defendant. Unfortunately, the pages as stapled by me are in the wrong order. I'll ask you to look at the last page. Footnote 21.

I gave somebody my highlighted copy. Who's got it? Can I have that so I can remember what I was supposed to say. Thank you, ma'am.

Look at the Footnote 21. Finally, plaintiffs suggestion that Autoliv Japan has improperly withheld insurance documents. That is not true. Now, that's a flat statement.

Look on down. It says, during discovery Autoliv revealed one policy for -- its primary policy for 25 million, but it didn't produce anything else. Plaintiff -- and then it blames plaintiff for the fact that Autoliv didn't fully answer the interrogatory. But plaintiff chose not to challenge Autoliv Japan's objection during discovery. And then it said, what we

could do -- what plaintiff could do is, post judgment we could do discovery to get the rest of the insurance coverage. Well, we asked years ago. And there is a lot of Georgia cases on this, the Court of Appeals and I think a Supreme Court case about not disclosing insurance coverage. The plaintiff is not required to assume that the objection means that the defendant is concealing evidence. We're not required to do that.

And the point is, we ask the Court today to take into consideration entering an order instructing this defendant to identify all its insurance coverage pursuant to our interrogatory that was posed years ago.

I'll tell you what, since Mr. -- Justice Blackwell only covered two of their arguments, and I'll get to Bosch in a moment, I'll be brief on that. I want to cover, all of the arguments, all of the bullet points for -- whatever they wrote.

THE COURT: You do what you need to do.

MR. BUTLER: All right. Well, the brief that was drafted by Mr. Weeks and Ms. Cannella is so good that I don't know that I can add much to it.

I will say that this argument that there should have been no punitive damages at all is truly frivolous and truly outrageous. Even making it ignores any evidence rule. The evidence rule applies to jury verdicts. This is a bench verdict. And to say that you were dead wrong is ridiculous, especially when, as the Court's judgment recites, Autoliv's own corporate

representative admitted that the spool out was foreseeable and foreseen and was avoidable, and that the consequences of that foreseeable occurrence were foreseeably catastrophic, and that that is the equivalent of intentional.

Now, I've been practicing law 45 years, and I've got a lot of punitive damages verdicts. I've never had a defendant's own corporate representative admit that misconduct was the equivalent of intentional until this case.

My former law partner tried a case in front of Judge Duross Fitzpatrick many years ago. The case arose in Americus and tried in Macon, because that's where Judge Fitzpatrick lived, he lived in Cochran, near there. We went there and tried the case, so we did. And the jury came back with a question. And normally what judges do, they call the lawyers in and say this is the question. Do y'all have anything to say? Judge Fitzpatrick didn't do that. He was a no-nonsense sort of judge. He just called the lawyers, he's standing at the bench with his question, note paper in the hand, he called the jurors in and he said, ladies and gentlemen, I have a note here that you want me to recharge you on when it is appropriate to impose punitive damages. I will now do that. Ladies and gentlemen, you impose punitive damages when after considering all of the evidence, you conclude that the defendant just did not give a damn. Is that clear? They all nodded their heads, got up and came back with a punitive damages verdict.

That is the standard for punitive damages and it's aptly admitted in this case.

We touched on the argument that the Court was wrong considering the financial condition of Autoliv, and the Court's judgment speaks to that. I won't recite from it, but there is more, and this is in our response brief. Any time anybody from Autoliv, any Autoliv speaks about this judgment, it's never anybody from, quote, Autoliv Japan, Ltd., close quote.

There is a January 31 Law360 article quoting the senior vice president of a communications firm, Autoliv, a lady named Gabriella Echelon. She works in Stockholm, Sweden. She doesn't work for Autoliv Japan, Ltd. She works for Autoliv AB's headquarters. And her official statement on behalf of Autoliv was this: Autoliv believes, quote, final judgment should be modified in several respects for the reasons set forth in, quote, our motion, close quote.

Justice Blackwell said that this kind of conduct of making no distinction itself -- making no distinction amongst various corporate subsidiaries is fairly unremarkable. Well, it's remarkable to my experience. I've never had this experience before where there really is no distinction. Justice Blackwell said that the Court, to consider any evidence about Autoliv, Inc's, financial condition, the Court first had to pierce the corporate veil. I listened very attentively. Justice Blackwell did not cite a single case from anywhere for that proposition. I

don't think there are any in the brief that he filed.

Now, let me turn to this ratio argument. First, first thing I want to say about it is this: The issue in those cases, Gore and State Farm is notice, that's the due process issue. Is the defendant put on notice that this could happen. Well, what's the punitive verdict in this case? Under $100 million. 28 years ago in Mosley v. General Motors, the Georgia Court of Appeals issued an opinion upholding or stating that $101 million punitive damages verdict was appropriate. $101 million 28 years ago. The Court of Appeals held, quote, it was not unreasonable and rashly served the purpose of punishing and deterring, close quote.

Given the fact that the award was supposed to achieve, quote, the public nature of the harm in this case, the corporate defendant involved and the protection afforded by the statute 101 provision, close quote. That's 28 years ago.

There is a mention in the defendant's motion about how they didn't have notice. You're supposed to compare what sort of non-civil litigation penalties might apply, and we covered this in our brief. They cite to the United States Code back in 2005. But in 2021, O.C.G.A. Section -- or excuse me, 49 U.S.C. § 30118(c) provided penalties of up to $105 million. I've got the wrong section. That's Section 301658. $105 million, 28 years ago. Notice, $101 million was approved based in theory by the Georgia Court of Appeals.

The statute at issue for -- under the Federal Rule of

Vehicle Safety Act would allow penalties up to $105 million.

Justice Blackwell argued that, quote, it all depends on what counts on the compensatory side of the ledger. And to try to get the punitive damages verdict down, they say only the pain and suffering, $2 million count. The death damages don't count. With all due respect to Justice Blackwell, that makes no sense at all.

The Court has to ask itself, does -- is the due process clause of the United States Constitution different depending on what state you're in? Because that's their argument, that it is.

Why is that their argument? In Alabama there is no compensatory damages for wrongful death. It's all punitive. Well, what do you compare it to then? I guess the due process clause just doesn't exist for cases originating in South Carolina -- in Alabama. What about South Carolina? Which, as I recall, the death damages go to the estate. The same place as pain and suffering damages. So in South Carolina if this case were there, we would have $27 million worth of compensatories undisputed, and the ratio would be 3.7, which it is under the Court's judgment. But because we're in Georgia and there is a vagary of Georgia law that says the pain and suffering goes to this lady, Ms. Andrews, as administrator of the estate, and the wrongful death damages goes to this lady, Ms. Andrews, as personal representative and surviving spouse, therefore, not all of that is compensatory. That's the argument. Death damages are not compensatory, so they don't count for ratio purposes. That is

hairsplitting nonsense.

What about the states where -- unlike Georgia, where the measure of damages and the full value of the life to himself as though he had lived? And under the law from 1991 and I've forgotten what it's called, it's a modified Lord Campbell's Act, I think, but don't trust me on that because that is a long time ago. There are states where the death damages are viewed from the perspective of the survivors. What did they lose?

Now, a wrongful death claim in Tennessee or in North Carolina, where I've had them, is worth a lot less than a wrongful death claim in Georgia because of the different viewpoints. Because if viewed from the -- from under those states case law, viewed from the standpoint of the survivor, that non-economic damages are de minimis, especially in Tennessee, as I recall.

So what about in a state where the wrongful death case is not as valuable as it is in Georgia? Well, you change the ratio according to Autoliv's argument. Change the ratio. That means the due process clause means one thing in Georgia and something entirely different in Tennessee. Respectfully, by no stretch of anybody's imagination, even the most brilliant lawyer can it be said that parts of the United States' Constitution apply or mean different things depending on which state you're in. It's nonsense.

Now, so what does count as damages? Well, you know, the whole argument is based upon BMW v. Gore.

So what did the U.S. Supreme Court say in BMW v. Gore? First fact, I think, is reprehensibility, and defense lawyers don't want to touch that too much because the Court's judgment about reprehensibility is eloquent, and I'll just adopt it.

But the second factor is, quote, the ratio of the punitive damages award to the actual or potential harm suffered by the plaintiff, close quote. All right, let's use that as BMW v. Gore, 517 U.S. et seq., at page 574. Let's look at the actual or potential harm suffered by the plaintiff. Here is the plaintiff. What was the actual harm suffered by the, quote, plaintiff, close quote. Her husband was killed. And they say that doesn't count. It's nonsense.

But there's more. What was the potential harm? Micah could have been -- could have survived. He could have just been brain-damaged in a coma like the plaintiff in the Bibbs case which we to cited in our brief, Bibbs v. Toyota. He could have lived 30 years with a life care plan of 4 to $7 million. Gore says that counts. See, would not have even had this argument if they had not killed Micah. If he had been brain-damaged, then there would have been a claim not by his estate but by his conservator for pain and suffering, including life care plan. What if his life care plan was $47 million? Let's put that in the ratio. Then the punitive damages the Court entered would be two to one.

There's no doubt that what the Supreme Court said was, quote, the actual or potential harm suffered by the plaintiff.

Now, Autoliv discussion of ratios begs the question, which I don't ask the Court to lay judgment until the U.S. Supreme Court takes it up again, the future of viability of this entire hairsplitting ratio argument. Given the changes in the makeup of the Court and the protestations by those recently entering the Court that there are strict constructions. If you look back at some of the dissents from these ratio cases, a combination of folks, Scalia, Thomas and Ginsburg. That's kind of an academic observation, and we're not supposed to deal in academics.

And so with respect to this hairsplitting ratio argument, we respectfully submit that the actual damages include death, the potential damages would have been much more in terms of compensatory damages had he been brain-damaged in a coma for decades.

The mere fact that under the venues of Georgia law, the pain and suffering damages go to this lady as administrator, and the wrongful death damages go to this lady as his personal representative is meaningless for purposes of trying to calculate the ratio. Actual or potential is $27 million rendered in this Court's judgment.

This ratio argument is not unlike Autoliv's, quote, not actively involved in the design argument, which was frivolous at all times. And not unlike Autoliv's refusal for seven years to admit that the airbag was defective, which was frivolous, which Autoliv essentially admitted by finally admitting on the morning

on the first day of trial that the airbag was defective. Really incredible, seven years.

We respectfully submit that the argument is, according to the words of a defense lawyer who is close to me, at a minimum, unquote, intellectually dishonest.

I will talk about -- just to hit on the excessive fines argument that remains in their motion, no Georgia court has ever held that punitive damage verdict should be reversed because of excessive fines. The cases cited in our response about that Hospital Authority of Qwinnett County v. Jones, that was my case. And Mack Trucks, Inc. V. Conkle, I filed an amicus curiae brief in that case.

Autoliv even makes an argument about capping the punitive damages in -- in an amount -- at the amount of compensatory damages, which would be $27 million here. And we, as we've noted in our response brief, in the Cote case just last year, the Eleventh Circuit flatly rejected that very argument, but they still make it, they still make it in their motion to amend, an argument that they know that the Eleventh Circuit just rejected last June.

Now, let's turn to Bosch. Your Honor, I will be brief. And I will go back to the first point I made, and that is, Rule 59 does not allow you to rehash things already litigated in a motion to amend a judgment. This is already litigated. The Court decided this. And the Court's order stated, judgment stated,

Document 534, page 64, quote, Autoliv has not established a rational basis for apportionment as to Mr. Andrews and Bosch, but has established a rational basis for apportionment as to Mazda, close quote.

Well, you can't have apportionment without a rational basis. That's the law. Mr. Scribner can't change that law. There was no error at all. There was certainly nothing anyone could reasonably call, quote, clear error, close quote.

As the Court noted, Chris Caruso's testimony about this was, quote, credible, close quote, and unrebutted, close quote. And remember this, whose expert was Chris Caruso? Ours and theirs. They identified him as an expert. We had a big kerfuffle, I guess is the way you pronounce it, about that.

What this is all about is it is undisputed and indisputable that Mazda was responsible for the airbag sensoring system. That is what Mr. Caruso testified to without rebuttal, without contradiction. And he was their expert witness. What Mr. Scribner wants is two bites of that delicious apportionment apple. You've already apportioned to Mazda, and he wants to take another bite of the compensatory damages and apportion some to Bosch. That argument is purely frivolous.

Mr. Scribner said plaintiffs agree that the elements of a product liability claim is met as to Bosch. That is not true. It's not true. It's not true that we agree, it's not true that they are met. And the reason is one of the elements of a products

liability claim is that the component was defective when it was sold. There is no proof of that; not by us, not by Bosch. Bosch sold a single sensor. There is no evidence that single sensor was defective. Mr. Scribner tries to alleve (sic) that distinction by talking about how there should have been two sensors. Well, we agree, there should have been two sensors. That wasn't Bosch's decision, that was Mazda's decision.

The single sensor was not defective when Bosch shipped it. End of products liability claim. That's why we dismissed it, unless we determine that. It was defective because of the way Mazda implemented it. That's undisputed.

Now, Mr. Scribner wanted to cite to Mr. Caruso's testimony. Here is what Mr. Caruso said. This is Exhibit 2 to our response document, 545-2, trial testimony on Wednesday, October 6, page 88.

Question -- who is asking the question? Do you remember? Is that you? Ms. Cannella was asking these questions.

Did you determine whether it was Bosch's fault that the wire got cut or the sensor came apart?

Answer: It was a combination of Mazda's decision on how to route this wire and the decision to use the substandard connector. Not sensor, connector.

Question: And using the connector was Mazda's decision or Bosch's decision?

Answer: From what I gathered from all of the

documentation that I read, it was Mazda's decision.

Question: You didn't have a document that you could hold up and show this is Bosch's fault, at least in part?

Answer: Correct, I did not.

Why are we arguing about Bosch? They put it at the end of their motion, because it was a throwaway that we spent all this time on.

Mr. Scribner said, quote, it is undisputed that Bosch sold a defective part, close quote. Not only is that not correct, not only is it not undisputed that Bosch sold a defective part, there is no evidence that Bosch did that. That's why they were dismissed.

Mr. Scribner quoted -- he said that if Mr. Caruso said if you had two sensors, there would be no defect. He didn't say -- Mr. Caruso didn't say that the sensor that Bosch sold was defective, period.

Now, why do we know that for Mr. Scribner to make that argument, he first had to say there was evidence that -- it would have to be unrebutted evidence -- that the Bosch sensor that it sold was fake. How did we know he has to do that? Well, we have an opinion by the Eleventh Circuit. Well, this case. It's just a two-page opinion.

THE COURT: Okay.

MR. BUTLER: The names of the judges and the word per curiam is on page 1. The second page has three lines. In the two

pages of the Eleventh Circuit opinion in this case, the Eleventh Circuit held that under Georgia law, the main factor of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort for personal injury resulting because the property when sold by the manufacturer was, brackets, defective, close brackets, and its condition when sold was the proximate cause of the injuries sustained.

No evidence that the product that Bosch sold was defective, none whatsoever.

We will conclude by saying this Court has invested an enormous amount of time and effort in trying the case and pretrial proceedings and its judgments, finding of facts and conclusions of law. There is no plain error of law or of fact. Indeed, there is nothing new argued by Autoliv except for this ratio argument. There is no newly-discovered evidence. Autoliv doesn't even contend that there is.

Plaintiff Jamie Andrews respectfully requests -- makes this request of the Court, given what Mr. Scribner said today, which was not unexpected, let's get on to the Eleventh Circuit. Let's review this Court's judgment de novo and reverse only if it finds, quote, clear error, close quote, which it cannot. Thank you very much, Your Honor.

THE COURT: Thank you, Mr. Butler.

Before Mr. Butler sits down, Mr. Butler gave us,

Mr. Scribner, Plaintiffs' Exhibit 1184, and Plaintiffs' Exhibit 1185. Any objection to the Court considering these?

MR. SCRIBNER: No, sir.

I'll be brief.

Four things: First, the quote that there was no rational basis to apportion fault to Bosch sounds familiar because they drafted it. That was in their proposed order, and they led you astray. It was wrong.

Two, wires cut. I covered that. It doesn't matter. It doesn't matter if it gets dislodged when you have two; he's alive today. I don't know why we are even talking amount at this point.

Three, he said there was no evidence that the electronic sensor system caused this failure. It's your judgment, page 20 and 71. You say, quote, Bosch's airbag electronic front sensor system component ultimately caused the nondeployment of the airbag. Their expert agrees. Here's the rub. This is the -- all of that -- I'm not going to use "frivolous." I'm not going to use "wasteful." You know, I've heard so much of it. I've heard so much of it. I heard the name calling. I'm not going to do it. But everything that you just heard up to this point is not the rub. This is the rub. Manifest injustice. It's a high standard, no doubt about it. But it doesn't suggest evil, intent to harm. You know, I think some lawyers look at that language and they think that I have to prove that you tried to hurt us or you intentionally did something. That's not what I'm suggesting at

all. I'm suggesting that you made a mistake. I've made mistakes. Everybody makes mistake. And I would like to see you remedy that mistake, and I'm going to leave you with this. Because the last thing you said was, there is no evidence that one sensor is defective. I'm going to leave you with that, because here is where I didn't make a mistake and here is where their expert, the one that they paid to get up and testify, here's what he said. And I'm citing Chris Caruso trial transcript Volume 3 a.m. at page 110.

Question: So $5, if Mazda pays that and adds the sensor, this airbag would have deployed from this accident; right?

Answer: That would be my belief. A properly developed system, yes, it would deploy.

That's it. Of course he said several times that two is better than one. One rendered it defective, if two were there, he would be alive today, and Bosch supplied that part. Those are the facts. I'm going to leave the rest for Justice Blackwell, unless you have any questions.

THE COURT: Thank you, Mr. Scribner.

MR. BUTLER: May I respond very briefly?

THE COURT: No, they get the last word. Justice Blackwell.

JUSTICE BLACKWELL: Judge, I'll be very brief. I do want to -- I do want to hit on a few points that Mr. Butler made in connection with the ratio argument.

And kind of working backwards through his argument, he talked near the end of his discussion of the ratio about the Cote case from the Eleventh Circuit, and that was a Phillip Morris case, it one of the Engle tobacco cases that came out of Florida. In that case Phillip Morris took the position that where you had a $6 million compensatory award in that case, you absolutely were required to go no further than a one-to-one ratio. So you couldn't have a punitive award in excess of that amount.

The Eleventh Circuit rejected that and probably correctly in the sense that there is no bright lines.

I mean, even in BMW v. Gore and State Farm v. Campbell, U.S. Supreme Court makes very clear that they're not interested in drawing bright lines. It doesn't change the fact that as the Eleventh Circuit recognized only about a year before the Cote case in Williams v. First Advantage, which is 947 F.3d 735, in that case they recognized the principle that the Supreme Court did allude to in Gore and Campbell, which is there is an inverse relationship between the acceptability of a particular ratio and the size of the compensatory award. When you have a really substantial compensatory award, a higher ratio is less justifiable generally speaking.

And, also, as a general proposition, when you have de minimis compensatory damages, a case where this could have been really bad but it turned out not to be just by fortuity, that can -- that can justify a much higher ratio. That's -- that's

where the Courts have looked to, as Gore and Campbell suggest, potential harm in lieu of actual harm. They tend to go to potential harm in cases where you have a very de minimis sort of harm actually proved for conduct that threatened very serious harm. That is just not the case in a case like this one.

Now, Mr. Butler said Autoliv seems to be arguing that due process means something different in Georgia than it does in Alabama, than it does in South Carolina. That is not what we are arguing. Due process means the same thing in all 50 states of these United States. Due process means that there has to be a reasonable relationship and proportionality between compensatory damages and punitive damages.

Now, what a particular state's legislature decides they will compensate for, what they decide they will punish for, that may very from state to state. And so you might have cases that involve similar fact patterns that come out very differently under the due process ratio, but that's simply because of legislative choices made state to state about what conduct leads to punitive damages and what conduct leads to compensatory damages. Due process requiring a proportionality, requiring a reasonable relationship between the two in any particular case, that is the same across the nation.

Mr. Butler referred to the civil penalty, and the course of civil penalty we could find, Your Honor, was the one that is in the Federal Motor Vehicle Safety Act for violations of those

standards. Of course, this seat belt did not violate those federal standards. But we think that was the closest legislatively authorized penalty. And it is true that Congress has raised the aggregate penalty substantially since the time that it was involved in this case in the early 2000s, but we think it's appropriate for the Court to look at what the penalty was then. Because the entire purpose, and Gore and Campbell make this clear, the entire purpose of looking at what legislature had authorized, is to see whether a defendant had fair notice. And so you would have fair notice at the point in time when you take the action that is complained of. And here the action complained of is the desire and provision of a seat belt for a 2005 Mazda 3. In fact, in the Clark case out of the Sixth Circuit, which is cited in our briefs, the Clark case that's what they do. It was actually a case decided around 2005, but they actually look back to the -- what the penalty was in the mid-'90s when the relevant conduct in that case occurred. And they said that is the civil penalty we look to on the third guidepost.

The last point I want to make is this. Mr. Butler alluded to the great success he's had over the years in getting punitive damages awards, and there is -- I'm quite familiar with his record. You are quite familiar with his record, Your Honor. He has a very impressive record. And he knows the Mobley case better than I ever could. That was -- that was his case, and he mentioned the decision of the Court of Appeals in 1994.

Now, for several reasons we don't think it's really authority for much of anything on punitive damages. First of all, Judge Banke especially concurred on rehearing did not join the -- Judge Blackburn's discussion of punitive damages. Even in the original opinion, they were reversing on liability issues for a new trial. So the punitive damages award went out the window anyway. So really anything the Court said about punitive damages was dicta. Judge Banke recognized that. That's why his disagreement with the majority about punitive damages was a concurrence and not a dissent. If it had been a dissent, if there actually was any holding in Moseley on punitive damages, I believe at that point in time the rules of the Court of Appeals would have required it to go to seven judges, instead of just the three. So we know there was not a holding about upholding punitive damages.

But nonetheless, there is one very interesting aspect of Judge Blackburn's discussion of punitive damages. And the Moseley case is 213 Ga. App. 875, and this is over on page 885. And this is what's so interesting. He is addressing an argument about ratio. Now, this is before BMW v. Gore. The Court may recall there were a couple of cases from the U.S. Supreme Court that kind of hinted what the BMW v. Gore ultimate analysis would be. There was the Haslip case, I think in the late '80s. There was the TXO case. The Court didn't firmly lay down the due process framework until BMW v. Gore, but nonetheless they kind of hinted at some of these things, and some of the principles were starting to take

shape by the early '90s when Moseley was decided. So GM in that case in challenging the punitive damages was talking about the ratio.

Now, what were the awards in Moseley? It was a wrongful death case, but there were also damages awarded for pain and suffering. So what were those damages? A little more than $4 million on the wrongful death claim, $1 on pain and suffering, and $101 million in punitive damages.

Judge Blackburn writes this: In this case GM concedes that the proportion of punitive damages to compensatory damages is not dispositive, but nevertheless contends that the proportion in the instant case, i.e., 100 million to one, demonstrates the excessiveness of the award.

So Judge Blackburn thought in a case that involved $1 in pain and suffering damages, $4.2 million in wrongful death damages and $101 million in punitives, he thought -- at least his opinion suggested, he thought that the ratio was 100 million to one. Not a $101 million to $4 million.

MR. BUTLER: Do you have a copy of the Moseley opinion that you're reading, by any chance?

JUSTICE BLACKWELL: We do.

MR. BUTLER: Did you say Judge Blackburn said that or GM contended that?

JUSTICE BLACKWELL: Judge Blackburn was writing about what GM contentions were, Your Honor, but in doing so he points

out that the proportion in the instant case, i.e., 101 million to 1. Like I said, everything in Moseley on punitive damages is in some sense dicta, but what we are proposing, that wrongful death damages should be excluded, is nothing new. It was acknowledged by Judge Blackburn in the Moseley decision.

So with that, Your Honor, we will ask the Court to give full consideration, I'm sure the Court will, to our motion. We would ask the Court to grant the motion and revise the award accordingly.

THE COURT: Thank you. Thank you, Judge Blackwell.

Thank y'all for being here today, for your time, for your preparation. Y'all were really prepared, and I like to acknowledge when the lawyers come in prepared. Don't worry about sending anything more today. Wait until you get my order and scheduling and everything. I will keep y'all posted. I like to get all the orders out at one time, so I may not rule on the third motion until I hear everything and just issue one big order. Thank y'all. Have a good day.

MR. SCRIBNER: Thank you, Your Honor.

(Whereupon, the hearing concluded at 12:42 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

I do hereby certify that the foregoing pages are a true and correct transcript of the proceedings taken down by me in the case aforesaid.

This the 6th day of April, 2022.

/s/Viola S. Zborowski
VIOLA S. ZBOROWSKI, CRR, CRC, CMR, FAPR
OFFICIAL COURT REPORTER